

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080929
Plaintiff-Appellee,	:	TRIAL NO. B-0408159-A
vs.	:	<i>JUDGMENT ENTRY.</i>
DAVID FOSTER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial in 2005, defendant-appellant David Foster was found guilty of trafficking in and possession of heroin, along with two accompanying major drug-offender (“MDO”) specifications. The trial court imposed a 34-year prison term. On appeal, this court affirmed the findings of guilt, but remanded the case for resentencing under *State v. Foster*.² The trial court imposed the same sentence. Foster appealed again. In that appeal, we held that Foster’s trafficking and possession convictions involved allied offenses of similar import and again remanded his case for resentencing. This time, the trial court imposed a 17-year term—10 years of mandatory confinement under the MDO sentencing provision set forth in R.C. 2929.14(D)(3)(a), and an MDO “add-on” sentence of 7 years under R.C. 2929.14(D)(3)(b). Raising five assignments of error, Foster now appeals from his second resentencing. We affirm.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470.

In his first assignment of error, Foster claims that the trial court erred when it sentenced him to the 7-year MDO add-on under R.C. 2929.14(D)(3)(b). He contends that R.C. 2929.14(D)(3)(b) was completely severed from Ohio's sentencing scheme in *State v. Foster*,³ thereby stripping the judiciary of the authority to sentence a defendant to any MDO "add-on." But *Foster* severed only those code provisions that had required judicial fact-finding.⁴ It left intact the authority to impose additional penalties for MDO specifications.⁵ This argument has no merit.

Foster next contends that the MDO add-on violated the prohibition against double jeopardy. He argues that since the jury's MDO finding resulted in a ten-year mandatory sentence under R.C. 2929.14(D)(3)(a), the add-on penalty in R.C. 2929.14(D)(3)(b) constituted multiple punishment for the same crime.

Not every imposition of multiple punishments violates double jeopardy. The legislature may allow for cumulative punishment for the same conduct.⁶ Our review of this issue is limited to ensuring that the trial court did not exceed its statutory sentencing authority.⁷ It did not. Foster's sentence fell within the statutory range set forth by the legislature. There was no double-jeopardy violation.

Foster's first assignment of error is overruled.

Foster's remaining assignments of error each contest matters pertaining to his 2005 trial. The issues raised are therefore res judicata since they could have been, or were, decided in his direct appeal from that judgment.⁸ On this basis, we overrule Foster's second, third, fourth, and fifth assignments of error.

The trial court's judgment is affirmed.

³ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

⁴ Id.

⁵ Id. at paragraph six of the syllabus; see, also, *State v. Pena*, 10th Dist No. 06AP-688, 2007-Ohio-4516.

⁶ *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903, ¶40.

⁷ Id., citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 433 N.E.2d 181.

⁸ *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 5, 2009

per order of the Court _____.
Presiding Judge